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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 LINDA HERNANDEZ,) Case No. ED CV 08-1243 PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 Commissioner of the)
15 Social Security Administration,)
16 Defendant.)

17 I. INTRODUCTION

18 Before the Court is Plaintiff's appeal of a decision by Defendant
19 Social Security Administration ("the Agency"), denying her application
20 for Disability Insurance Benefits ("DIB"). Plaintiff claims that the
21 Administrative Law Judge ("ALJ") erred when he failed to properly
22 consider the treating doctor's opinion regarding her limitations,
23 including the fact that she needed a cane to walk, and to include
24 those limitations in the hypothetical question to the vocational
25 expert. (Joint Stip. at 3-5, 7-9, 13-18.) She also argues that the
26 ALJ erred when he found that she was not credible. (Joint Stip. at 9-
27 11.) For the reasons discussed below, the Agency's decision is
28 REVERSED and the case is REMANDED for further proceedings.

II. SUMMARY OF PROCEEDINGS

Plaintiff applied for DIB on April 28, 2004. (Administrative Record ("AR") 62.) The Agency denied the claim initially and on reconsideration. (AR 34-40, 48-52.) Plaintiff then requested and was granted a hearing before an ALJ. (AR 53-57.) On July 20, 2006 and December 7, 2006, Plaintiff appeared with counsel and testified. (AR 416-72, 473-515.) On March 2, 2007, the ALJ issued a decision denying Plaintiff's application. (AR 13-23.) He found that Plaintiff was unable to perform her past work, but that she had the residual functional capacity to do other work existing in the national economy. (AR 22-23.) After the Appeals Council denied review of the ALJ's decision, (AR 6-8), Plaintiff commenced the instant action.

III. DISCUSSION

In her first claim of error, Plaintiff contends that the ALJ failed to properly consider treating physician Patricia McGhee's June 2006 residual functional capacity assessment. (Joint Stip. at 3-5.) For the following reasons, the Court agrees.

In her June 2006 assessment, Dr. McGhee opined that Plaintiff could lift or carry less than ten pounds occasionally, but could lift or carry ten pounds frequently;¹ could stand or walk for no more than two hours in an eight-hour workday; needed the assistance of a cane for stability; needed to alternate standing and sitting at least once every hour to relieve pain; and could only occasionally kneel, crouch, or crawl. (AR 396-97.)

At the July 20, 2006 hearing, the ALJ asked testifying medical expert Dr. Sami Nafosi about Plaintiff's functional limitations. (AR

¹ This inconsistency is addressed below.

1 433-34.) Dr. Nafoosi opined that Plaintiff could "on occasion lift 20
2 pounds, [ten] pounds frequently. She can sit for eight hours in an
3 eight hour day. Stand or walk for four hours of an eight hour day
4 provided she's allowed to change positions briefly each hour." (AR
5 434.) The ALJ then asked Dr. Nafoosi about Dr. McGhee's June 2006
6 residual functional capacity assessment:

7 ALJ: Okay, for lifting and carrying occasionally, as I said,
8 [Dr. McGhee] indicated less than 10 pounds. And then
9 said increased pain in the feet.

10 ME: Right, right, that's, that's where I got the impression
11 that it was mostly with feet.

12 ALJ: Okay. And something lifting but I can't read the rest
13 of it. But then inconsistently [Dr. McGhee] has ten
14 pounds which makes no sense.

15 ME: Yeah, that's inconsistent.

16 ALJ: Yeah, that wouldn't make any sense . . . Yeah, [Dr.
17 McGhee] said [Plaintiff] could frequently lift ten but
18 only occasionally could lift less than ten. That
19 doesn't make sense. [She] apparently missed something
20 there. All right. And then standing and walking [she]
21 has less than two in an eight hour day and the medical
22 findings is supporting the assessment. [She] says pain
23 with standing.

24 ME: Have a cane for balance.

25 ALJ: Right.

26 ME: [INAUDIBLE], you know, I mean I limited her because of
27 the problems with the knees . . . [¶] . . . and when
28 you take into account the feet and, you know, she's

1 [INAUDIBLE] that objectively it seems like she's
2 considering the feet to be severe [INAUDIBLE]. And the
3 feet I see [INAUDIBLE] and it would be just a temporary
4 condition.

5 (AR 443-44.) There was no further discussion of Dr. McGhee's opinion
6 at the hearing.

7 In his decision denying benefits, the ALJ recited Dr. McGhee's
8 June 2006 assessment, as well as assessments by a consultative
9 examiner in July 2004 and state agency reviewing doctors in August and
10 November 2004 that were less restrictive than Dr. McGhee's. (AR 21.)
11 The ALJ also noted Dr. Nafosi's testimony that Plaintiff would be
12 restricted to lifting ten pounds frequently and 20 pounds
13 occasionally, and to standing and walking for up to four hours in an
14 eight-hour workday, with the need to alternate sitting and standing
15 about once an hour. (AR 21.) The ALJ concluded that Dr. Nafosi's
16 opinion "seems well-supported by the overall record and is therefore
17 credited with controlling weight." (AR 21.)

18 It is well-established that, "[b]y rule, the Social Security
19 Administration favors the opinion of a treating physician over non-
20 treating physicians." *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.
21 2007); see also *Aukland v. Massanari*, 257 F.3d 1033, 1037 (9th Cir.
22 2001). A treating physician's opinion as to the nature and severity
23 of an impairment must be given controlling weight if the opinion is
24 well supported and not inconsistent with other substantial evidence.
25 Social Security Ruling ("SSR") 96-2p; *Edlund v. Massanari*, 253 F.3d
26 1152, 1157 (9th Cir. 2001).

27 Even where a treating physician's opinion is not given
28 controlling weight because it is not well supported or because it is

1 inconsistent with other substantial evidence in the record, an ALJ
2 must still consider various factors--including the length, nature, and
3 extent of the treatment relationship; the amount of relevant evidence
4 that supports the opinion; the consistency of the medical opinion with
5 the record as a whole; and the speciality of the physician providing
6 the opinion--in determining what weight to give it. *Orn*, 495 F.3d at
7 631 (citing 20 C.F.R. § 404.1527 and SSR 96-2p). Where the treating
8 physician's opinion is contradicted by a non-treating physician's
9 opinion, the ALJ must provide specific and legitimate reasons,
10 supported by substantial evidence in the record, for rejecting it.
11 *Id.* at 632 (citing *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
12 1996)). Where, however, the non-treating physician is a consulting
13 doctor who never examined the claimant and relied on the same clinical
14 findings as the treating physician to arrive at the opposite
15 conclusion as the treating physician, the consulting doctor's opinion
16 does not amount to substantial evidence. *Id.*

17 It is undisputed that Dr. McGhee was Plaintiff's treating
18 physician. (AR 76.) Indeed, the record shows that Dr. McGhee had
19 been treating Plaintiff from at least as early as October 2003. (AR
20 324, 333.) Having noted that the examining and reviewing physicians
21 disagreed with Dr. McGhee about Plaintiff's functional limitations,
22 the ALJ was required to provide specific and legitimate reasons for
23 rejecting Dr. McGhee's opinion. He did not do so. Rather, as set
24 forth above, the ALJ appeared to simply defer to the contrary opinion
25 of Dr. Nafosi, the testifying medical consultant. (AR 21.) That was
26 inadequate as a matter of law.

27 The Agency argues that the ALJ "reasonably adopted" Dr. Nafosi's
28 findings that there were "troubling inconsistencies" in Dr. McGhee's

1 report. (Joint Stip. at 6.) The Agency also argues that the ALJ made
2 other findings, e.g., that Plaintiff received only conservative
3 treatment and over-the-counter pain medication, that serve as
4 substantial evidence for rejecting Dr. McGhee's opinion. (Joint Stip.
5 at 6-7.) The Court rejects these arguments.

6 First, the ALJ did not state that he was relying on
7 inconsistencies in Dr. McGhee's report or Plaintiff's conservative
8 treatment as reasons for rejecting Dr. McGhee's opinion. As such,
9 those reasons cannot be considered by the Court.² See *Connett v.*
10 *Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (finding that it was error
11 "to affirm the ALJ's credibility decision based on evidence that the
12 ALJ did not discuss").

13 Second, Dr. Nafosi did not examine Plaintiff or perform any
14 tests on her. He merely reviewed Dr. McGhee's records (and those of
15 the other doctors) and offered an opinion that was different than Dr.
16 McGhee's. Under these circumstances, Dr. Nafosi's opinion does not
17 constitute substantial evidence to support the ALJ's rejection of Dr.
18 McGhee's opinion.³ *Orn*, 495 F.3d at 633.

19
20 ² In any case, the only inconsistency Dr. Nafosi found in Dr.
21 McGhee's report was that she found that Plaintiff could frequently
22 lift ten pounds, but only occasionally lift less than ten pounds. (AR
23 443-44.) The ALJ should have resolved this discrepancy by contacting
24 Dr. McGhee for clarification, not used it as the basis for rejecting
25 the opinion wholesale. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1150
(9th Cir. 2001) (remanding for development of the record where medical
26 expert found treating physician's records "confusing"); see also 20
27 C.F.R. § 404.1512(e).

28 ³ The one specific reason the ALJ actually gave for adopting Dr.
Nafosi's functional assessment was that "Dr. Nafosi emphasized that
the medical evidence of record does not reflect the muscle atrophy
likely to accompany marked impairment in ambulation." (AR 21.) The
(continued...)

1 In her second claim of error, Plaintiff contends that the ALJ
2 erred by failing to properly consider Dr. McGhee's determination that
3 she needed a cane. (Joint Stip. at 8; AR 396.) As explained below,
4 though the Court agrees that the ALJ should have mentioned the cane
5 and included it in his residual functional capacity finding, any error
6 was harmless because it did not affect the ALJ's ultimate finding that
7 Plaintiff could perform sedentary work. See *Stout v. Comm'r, Soc.*
8 *Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (holding that error
9 by the ALJ is harmless where the mistake "was nonprejudicial to the
10 claimant or irrelevant to the ALJ's ultimate disability conclusion.").

11 The ALJ noted Plaintiff's testimony that she needed a cane for
12 "any ambulation outdoors," as well as the assessment of Dr. Richard
13 Woods that Plaintiff required a cane for "prolonged ambulation." (AR
14 20, 21.) More importantly, the ALJ developed the record with respect
15 to Plaintiff's use of a cane at the second administrative hearing.
16 First, he elicited testimony from Dr. Nafosasi that Plaintiff's use of
17 a cane was consistent with the medical record. (AR 492.) Then, he
18 asked Plaintiff how she would need to use a cane when navigating about
19 an office. Plaintiff testified that she would not need her cane to
20 move around in her "little station," but that she would need it if she
21 walked away from the front office. (AR 493.)

22 In the hypothetical question to the vocational expert, the ALJ
23 asked whether an individual who "would not be able to go down the hall
24 or do any walking beyond just right around her workstation without the
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26 ³ (...continued)
27 record makes plain, however, that this comment was made during a
28 discussion of Dr. David Wood's October 2004 functional assessment.
(AR 229-30, 444-45.)

1 use of a cane" and who would have to steady herself with one hand
2 while at her workstation could perform the jobs of information clerk,
3 receptionist, or appointment clerk.⁴ (AR 489, 512.) The vocational
4 expert testified that that limitation "shouldn't have any impact at
5 all because all three of those jobs are sedentary which would limit
6 lifting to ten pounds." (AR 512.) The vocational expert opined that,
7 even if Plaintiff was limited to lifting less than ten pounds, only
8 the number of receptionist jobs would be reduced (by 50%), but the
9 other jobs would not be affected. (AR 513-14.) The ALJ relied on the
10 vocational expert's testimony that Plaintiff could do these three jobs
11 in concluding that Plaintiff could work. (AR 22-23.) Because the
12 ALJ's reliance on the vocational expert's testimony plainly
13 incorporated Plaintiff's use of a cane as she herself described it,
14 any failure to specifically include that limitation in his residual
15 functional capacity determination was irrelevant to the ultimate
16 disability determination and, thus, harmless.

17 In her third claim of error, Plaintiff argues that the ALJ erred
18 in finding her testimony incredible because he did not provide
19 specific evidence to undermine that testimony. (Joint Stip. at 9-11.)
20 The Court agrees.

21 ALJ's are tasked with judging the credibility of witnesses. In
22 making a credibility determination, an ALJ may take into account
23 ordinary credibility evaluation techniques. *Smolen*, 80 F.3d at 1284.
24 Where, as here, a claimant has produced objective medical evidence of
25 an impairment which could reasonably be expected to produce the

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27 ⁴ The ALJ added the limitation based on Plaintiff's cane use to
28 a host of other limitations he had previously described in the first
hypothetical question. (AR 486-88, 495.)

1 symptoms alleged and there is no evidence of malingering, the ALJ can
2 only reject the claimant's testimony for specific, clear, and
3 convincing reasons. *Id.* at 1283-84. In addressing the ALJ's
4 credibility determination, the Court focuses on the reasons set forth
5 by the ALJ in his decision and determines whether these reasons are
6 sufficiently clear and convincing to support it. *Connett*, 340 F.3d at
7 874 (holding it is error to affirm ALJ's credibility finding for
8 reasons the ALJ did not discuss).

9 Here, the ALJ noted that Plaintiff claimed to be "significantly
10 limited in her ability to ambulate due to problems with balance,
11 weakness in her knees, and other impairment in her lower extremities";
12 that she claimed to require the use of a cane; and that she testified
13 that she suffers from shortness of breath with exertion and that she
14 is unable to lift more than ten pounds. (AR 20.) He also noted that
15 Plaintiff claimed that she and her husband went out to eat every night
16 because she did not like to cook. (AR 20.)

17 The ALJ rejected this testimony, finding:

18 [T]he record does not show that [Plaintiff] has consistently
19 required particularly strong medication for pain. To the
20 contrary, in multiple statements, [Plaintiff] indicates that she
21 uses no pain medication except for aspirin and/or Celebrex.

22 (AR 20.)

23 The Court does not find this reason for rejecting Plaintiff's
24 testimony convincing. Plaintiff did not testify that all of her
25 symptoms were related to disabling pain, and the ALJ failed to explain
26 how her limited use of pain medication undermined her testimony that
27 she had problems with balance, weakness, shortness of breath, and
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1 carrying more than ten pounds.⁵ Because the ALJ did not make findings
2 "sufficiently specific to allow [this] court to conclude that [he]
3 rejected [Plaintiff]'s testimony on permissible grounds and did not
4 arbitrarily discredit [her] testimony," *Moisa v. Barnhart*, 367 F.3d
5 882, 885 (9th Cir. 2004), the matter must be remanded for further
6 consideration.⁶

7 In her fourth claim of error, Plaintiff contends that the ALJ
8 erred by failing to incorporate the functional limitations determined
9 by Dr. McGhee, as set forth above, in his hypothetical questions to
10 the vocational expert. (Joint Stip. at 13-18.) Because the Court has
11 determined that the ALJ must reconsider the treating doctor's opinion
12 and Plaintiff's credibility, this contention is moot. In light of the
13 Court's conclusions above, however, the ALJ may need to reconsider
14 this issue on remand as well.

22 ⁵ Although it is possible that the ALJ incorporated some of
23 these allegations in his residual functional capacity determination,
24 his decision is insufficiently clear on this point also, leaving it
25 for the Court to try to decide which parts of Plaintiff's testimony
the ALJ accepted, and which parts he did not.

26 ⁶ It can be argued that the ALJ also relied on conflicting
27 medical evidence from Plaintiff's doctors to support his credibility
28 finding. (AR 20.) Even assuming that this were true, it would not be
enough to reject her testimony. The ALJ did not explain how this
evidence undermined her testimony.

IV. CONCLUSION

For these reasons, the Agency's decision is reversed and the case is remanded for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

DATED: January 13, 2010



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE